United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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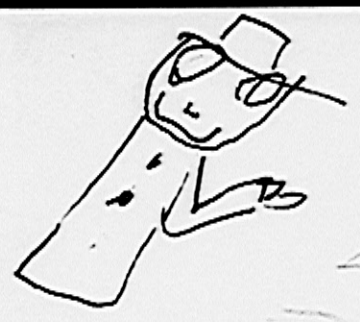

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,965

RAYMOND WOODY,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

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Appeal From Judgment of The
United States District Court
For The District of Columbia

BERNIE R. BURRUS

506 E Street, N.W.
Washington, D.C.

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(Appointed by this Court)

Washington, D.C.
February 18, 1964

STATEMENT OF QUESTIONS PRESENTED

1. Was the appellant's constitutional right to a speedy trial denied him by the delay of four months between the alleged crime and his arrest and another five months from arrest until trial, the court having continued the trial four times through no fault of appellant, and where actual prejudice in the form of the practical unavailability of appellant's only witness occurred when the case was finally tried?

2. Did the trial court err in denying appellant's motion for a mistrial when appellant's only witness declined to testify at trial, the court denying appellant's motion to compel the witness to testify, thus depriving appellant of his only defense?

3. Did appellant's failure to move for a judgment of acquittal deprive this Court of jurisidiction to order a new trial where substantial justice so requires?

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SPECIFICATION OF POINTS ON APPEAL

1. Appellant's constitutional right to a speedy trial was denied him by the delay of four months between the alleged crime and his arrest and another five months from arrest until trial, the court having continued the trial four times through no fault of appellant, where actual prejudice in the form of the practical unavailability of appellant's only witness occurred when the case was finally tried.

With respect to Point 1, appellant desires the court to read the following pages of the reporter's transcript: Tr. 19-21, 196-98, 219-20, 223, 182.

2. The trial court erred in denying appellant's motion for a mistrial when appellant's only witness decided at trial to decline to testify, thus depriving appellant of his only defense.

With respect to Point 2, appellant desires the court to read the following pages of the reporter's transcript: Tr. 19-21, 196-208, 218-23, 258-60, 269-73.

3. Appellant's failure to move for a judgment of acquittal does not deprive this court of jurisdiction to order a new trial where substantial justice so requires.

With respect to Point 3, appellant desires the court to read the following pages of the reporter's transcript: Tr. 33-35, 51, 66, 168, 72-73, 19-21, 223, 219-20.

TABLE OF AUTHORITIES

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United States Constitution

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,965

RAYMOND WOODY,)
Appellant,)
)
v.)
)
UNITED STATES OF AMERICA,)
Appellee.)

Appeal From Judgment of The
United States District Court
For the District of Columbia

JURISDICTIONAL STATEMENT

Raymond Woody, the appellant, was tried and convicted in the United States District Court for the District of Columbia of purchasing, selling, dispensing and distributing a narcotic drug, not in or from the original stamped package and knowing same to have been imported contrary to law, in violation of Title 26 U.S.C., Sections 4704(a), 4705(a); and Title 21 U.S.C., Section 174. The District Court had jurisdiction to try appellant for such offense. Title 18 U.S.C., Section 3231. Judgment of conviction was entered on June 14, 1963.

Appellant's motion for leave to prosecute appeal without prepayment of costs was granted on June 24, 1963, and on that date the notice of appeal was filed. This court has jurisdiction upon appeal to review the judgment of the District Court. Title 28 U.S.C., Section 1291.

STATEMENT OF THE CASE

On December 5, 1962, appellant, Raymond Woody, was charged and arrested for a violation of the Federal Narcotics Law [26 U.S.C. 4705 (a), and 4704(a); and 21 U.S.C. 174], said to have occurred on August 8, 1962 (four months before). (Tr. Plead., etc., P. 20.) He was brought before the Commissioner on December 6, 1962, and unable to post the bond of $3,500, he remained in jail until trial. Bond was subsequently reduced (April 3, 1963) by the Court to $1,500, which, however, appellant was still unable to meet (Tr. Plead., etc., P. 8).

On January 4, 1963, appellant was indicted by the Grand Jury on three counts: (1) that he did "sell, barter, exchange and give away to Robert I. Bush, a narcotic drug . . . not in pursuance of a written order, written for that purpose, from the said Robert I. Bush, as provided by law;" (2) that he "purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug . . .;" (3) that he "facilitated the concealment and sale of a narcotic drug . . . after said heroin hydrochloride had been imported, with the knowledge of Raymond R. Woody, into the United States contrary to law." (Tr. Plead., etc., Pp. 20-21.)

Counsel to represent appellant was duly appointed by the court. (Tr. Plead., etc., P. 17.) On January 18, 1963, appellant was arraigned and pleaded not guilty to all three counts of the indictment. (Tr. Plead., etc., P. 16.)

The case was originally set for trial on February 19, 1963. However, four successive continuances, none existing for more than one month and none granted at appellant's request, delayed the trial until May 1, 1963, five months after the arrest.

After moving under Fed. R. Crim. Proc. 16 and 17(c) for inspection (Tr. Plead., etc., Pp. 13-15), appellant learned the name of one "Dave," alleged by the government to have witnessed the sale by appellant to the undercover agent, Robert I. Bush, who was to testify against appellant at trial. Appellant, then, subpoenaed said Dave as a defense witness for the purpose of contradicting Bush's prospective testimony. (Tr. Plead., etc., P. 9.)

At the trial, the prosecution presented only <u>one</u> witness to tie appellant to the alleged sale, that being Officer Bush. Bush admitted that he did not know appellant at the time of the alleged sale, and that appellant did not know him. (Tr. Rec., P. 51.) Identification was made in an alley, eight days later, from a photograph supplied by Bush's superiors. (Tr. Rec., P. 168.)

When the prosecution had rested, appellant then called his witness, Dave, to contest the uncorroborated testimony of Officer Bush. A month before the trial, however, "Dave" had been arrested

for a different offense, and was in jail awaiting his own trial. (Tr. Rec., P. 223.) On advice of counsel appointed by the court at appellant's trial to protect Dave's constitutional rights, Dave decided to invoke his privilege against self-incrimination. (Tr. Rec., 219-20.) The questions proferred by appellant related only to the alleged transaction on the night of August 8, 1963, in relation to which Dave had not been charged with any crime. (Tr. Rec., Pp. 219-23.) Nevertheless, appellant's motion to compel Dave to answer was denied by the Court (Tr. Rec., P. 258.). Appellant moved to dismiss for lack of a speedy trial (Tr. Rec., Pp. 145). This motion, also, was denied by the court. (Tr. Rec., 155.)

On May 7, 1963, appellant was found guilty on all three counts. (Tr. Plead., etc., P. 6.) On June 14, 1963, he was sentenced to ten years on each count, such sentences to run concurrently. (Tr. Plead., etc., P. 5.) This appeal followed.

SUMMARY OF ARGUMENT

I. Appellant's Constitutional Right to a Speedy Trial Was Denied.

II. The Trial Court Erred in Denying Appellant's Motion for a Mistrial When a Material Defense Witness Took the Fifth Amendment at Trial.

III. Notwithstanding Appellant's Failure to Move for a Judgment of Acquittal, This Court's Jurisdiction to Order a New Trial is Not Abrogated Where Substantial Justice So Requires.

ARGUMENT

I. Appellant's Constitutional Right to a Speedy Trial Was Denied.

The Sixth Amendment to the Constitution provides that "an accused shall enjoy the right to a speedy . . . trial." Appellant contends that he was denied that right.

The relevant chronology is as follows:

Alleged Sale	August 8, 1962
Arrest	December 5, 1962
First Trial Date	February 19, 1963
Continued to	March 14, 1963
Continued to	March 25, 1963
Continued to	April 3, 1963
Continued to	May 1, 1963
Trial Dates	May 1 - 7, 1963

Thus, four months elapsed from the date of the alleged sale of narcotics to Officer Bush until the date of the charge and the arrest. Five additional months passed before the trial was actually commenced. In the latter interval four continuances were ordered by the court, none of which were attributable to any reason or fault of the appellant. During the five month period, appellant, being an indigent and unable to post the bond set by the court below, was in jail.

In addition to the time period, the following is significant. Officer Bush testified that the sale to him by appellant was made in the presence of one "Dave," and that Dave had, in fact, himself, made

a purchase at the same time from appellant. (Tr. Rec., 19-21.) Upon learning the actual name of Dave (James Porch), defense counsel subpoenaed him to testify on behalf of appellant. (Tr. Plead., etc., P. 9) When the case finally came to trial, Dave, upon whose testimony appellant's case was substantially predicated (Tr. Rec., 196-98), invoked the privilege against self-incrimination and declined to testify. (Tr. Rec., 219-20.) Dave had not been charged with any transaction or crime on August 8, 1962 (Tr. Rec., 223), but was, at the time of trial, in jail on another charge. He had been in jail for about one month as of the date of trial. (Tr. Rec., 182.)

The purposes behind the Sixth Amendment's guarantee of a speedy trial would appear to be: To protect the defendant from prolonged imprisonment during a period when he is still presumed innocent; to relieve him of the anxiety and suspicion attendant upon an untried accusation; and to insure him that his defense will not be damaged because witnesses become unavailable or memories become dim with the passage of time. See Petition of Proovo, 17 F.R.D. 183, 198 (D. Md. 1955) aff'd, 350 U.S. 857. The protection afforded by the Amendment must be assessed against the background of these purposes.

In determining in a particular case whether a defendant's constitutional right to a speedy trial has been denied or whether there has been unnecessary delay in bringing a defendant to trial, it is necessary, unless the case obviously falls on one side or the other of the line, to consider all the facts and circumstances of the delay. See Beavers v. Haubert, 198 U.S. 77, 87 (1905). These include the

length of the delay, the causes of the delay, whether the defendant was imprisoned during the delay, and whether, in fact, prejudice occurred as a result of the delay. Taylor v. United States, 99 App. D.C. 183, 238 F.2d 259 (D.C. Cir. 1956); King v. United States, 105 App. D.C. 193, 265 F.2d 567 (D.C. Cir. 1959), cert. denied, 359, U.S. 998.

The consideration of these circumstances in a determination of a defendant's speedy trial rights apply as well to the period between the alleged offense and the arrest, as between the arrest and the trial. As this court recently stated:

> [T]he constitutional guarantee protects against undue delays in presenting the formal charge as well as delays between indictment and trial. The Supreme Court's affirmance of Judge Thomsen's ruling in Proovo, infra, seems to have settled the point. See also our opinion in Taylor, infra. In a non-capital case, it is true, mere delay in presenting the charge will rarely work a deprivation of the constitutional right, for permissible time in that instance is normally governed by the statute of limitations. Yet, if the delay is 'purposeful or oppressive,' Pollard v. United States, 352 U.S. 354, 361 (1957), even an indictment within the limitation period may come too late to square with the Sixth Amendment. Mann v. United States, 113 U.S. App. D.C. 27, 29-30, n.4, 304 F.2d 394, 396-97, n.4 (D.C. Cir., 1962), cert. denied, 371 U.S. 896.

Appellant is aware of this court's recent decisions in Nickens v. United States, ___ U.S. App. D.C. ___, ___ F.2d ___ (No. 17,735, decided Sept. 19, 1963), and Redfield v. United States, ___ U.S. App. D.C. ___, ___ F.2d ___ (No. 17,818, decided January 30, 1964), holding

that the time period between offence and indictment is governed solely by the statute of limitations. Redfield, however, is distinguishable on the ground that there involved were a "series of transactions over a considerable period of time" (P. 3), whereas, the instant case involved only one sale. And, Judge Wright's concurrence in Nickens is, indeed, persuasive that the speedy trial rationales apply as well to the pre-indictment period as that thereafter:

> Indeed, a suspect may be at a special disadvantage when complaint or indictment, or arrest, is purposefully delayed. With no knowledge that criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings on the day of the alleged crime. Memory grows dim with the passage of time. Witnesses disappear. With each day, the accused becomes less able to make out his defense. If, during the delay, the Government's case is already in its hands, the balance of advantage shifts more in favor of the Government the more the Government lags. Under our constitutional system such a tactic is not available to police and prosecutors.

A constitutional right cannot depend on the terms of a statute. The legislature is free to implement the constitutional right and to provide protections greater than the constitutional right. But the minimum right of the accused to a speedy trial is preserved by the command of the Sixth Amendment, whatever the terms of the statute. See Nickens v. United States, supra at p. 7, n.4 (concurrence.)

Regarding the delay between the charge and the trial, this court recently held that a delay of five months might in appropriate circumstances constitute a violation of the Amendment. Smith v. United

States, ____ U.S. App. D.C. ____, ___ F.2d ___ (No. 17,106, decided Aug. 15, 1963). Appellant concedes that none of the four continuances in the instant case were at the behest of the prosecutor. But, on the other hand, neither were any of them due to any fault of the appellant, and as Judge Bazelon stated in King v. United States, supra (265 F.2d at 572-73):

> But the application of that amendment, providing that 'the accused shall enjoy the right to a speedy . . . trial,' does not turn on the question of responsibility. Even if no agency or instrumentality of the Government is responsible for the delay, where there has in fact been a substantial delay not of the defendant's own choosing — i.e., where he has not waived his right to a speedy trial — there has in law been a denial of a speedy trial. . . . Certainly the fact that the fault lies with the calendar system employed by the District Court rather than with the prosecutor does not prevent application of the Sixth Amendment. The right to a speedy trial guaranteed by that amendment means a trial without 'delays manufactured by the ministers of justice.' (dissenting.)

The majority in King found that under the facts of that case a delay of 140 days between arraignemnt and trial did not constitute a violation of the Sixth Amendment. Two significant differences, however, appear between King and the instant case. First, a substantial portion of the delay time (60 days) in King was requested by defense counsel. Secondly, the court in King appeared influenced by the fact that no prejudice was actually alleged to have been there suffered by appellant.

In the instant case, appellant was responsible for none of the

delays that occurred while he waited in jail for his trial to take place. Further, actual prejudice occurred in the unavailability at trial of a material defense witness. Officer Bush, the only government witness testifying as to the sale, stated on the stand that one "Dave" had witnessed the transaction. (Tr. Rec., 19-21) Obviously, the testimony of Dave (whom the government did not call to corroborate the sale) was vital to appellant's defense. About a month before trial, Dave was arrested on a different charge (Tr. Rec., 223). In jail, himself, at the time of appellant's trial, Dave decided, with advice of appointed counsel, at appellant's trial, to take the Fifth Amendment. (Tr. Rec., 219-20). Had the trial occurred at an earlier date, i.e., before Dave's arrest (still 8 months after the alleged offense in the instant case), there would have been no reason for invoking the privilege, and appellant's defense would not have collapsed in derogation of his Sixth Amendment right.

Thus, considering all the circumstances — a delay of nine months between alleged offence and trial, five of which occurred after the charge; appellant's inability to post bond, and the consequent incarceration for five months pending trial; his own non-involvement in any of the continuances ordered by the court; and, the actual prejudice caused by the resulting unavailability of a material defense witness — the balance must certainly tip toward a violation of the Sixth Amendment right. This court should right the wrong suffered by appellant in the trial below.

As to the question of waiver, it is conceded that appellant did not move before trial to dismiss for violation of his speedy trial rights. However, under the circumstances of this case, where the trial date was never more than a month away, failure to demand a speedy trial did not constitute a waiver of his right. See King v. United States, supra. See also Johnson v. Zerbst, 304 U.S. 458, 464 (1938) where the Supreme Court stated:

> It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.

The actual prejudice suffered as a result of the delay did not occur until trial when a material defense witness, previously available, became — through no fault of appellant — unable to testify. The failure to move before trial for dismissal could not, therefore, constitute a waiver of appellant's right to a speedy trial.

II. The Trial Court Erred in Denying Appellant's Motion For a Mistrial When a Material Defense Witness Took the Fifth Amendment at Trial.

Appellant was convicted on the uncorrobated testimony of a police undercover man. This same government witness, however, testified that one "Dave" had witnessed the sale. (Tr. Rec., P. 19-21.) Nevertheless, the prosecution did not call Dave to corroborate the alleged sale. He was, in fact, called by the appellant (Tr. Plead., etc., P. 9), who had every reason to believe that Dave would testify for the defense. Assuming appellant's knowledge before trial that Dave had, himself, been arrested and was in jail awaiting his own trial, such should not have caused any "reasonable anticipation" by appellant that Dave would not then testify for him, because Dave was not charged with any offense in connection with the time or events in question and appellant's questions of him related only to such time and events. (Tr. Rec., Pp. 196-97.) Further, the prosecution declined to give him immunity for such testimony.

Nevertheless, on advice of counsel appointed by the court to defend the witness's constitutional rights, Dave decided at trial to invoke the privilege against self-incrimination. (Tr. Rec., Pp. 219-20.) Appellant moved the court to compel Dave to testify on the ground that the questions did not relate to any offense with which Dave had been charged. (Tr. Rec., Pp. 258-60.) The motion was denied by the court. (Tr. Rec., P. 272.) Appellant then moved for a mistrial, which motion was also denied. (Tr. Rec., P. 220.)

Appellant contends that the denial of the last motion was error. His defence had been predicated upon the testimony of the witness, Dave. Could he have "reasonably anticipated" before trial that this defense would be unavailable, he could have concentrated upon building a different defense, or possibly a change of his plea. The court's denial of his motion, thus, left him without any defense at all, and permitted his conviction by the uncorroborated testimony of one police undercover man. Appellant asks this court to exercise its inherent power to render such judgment "as the justice of the case may require." Bryan v. United States, 338 U.S. 552, 559 (1950). Substantial justice would seem to require that, at the least, appellant be granted a new trial.

III. Notwithstanding Appellant's Failure to Move For a Judgment of Acquittal, This Court's Jurisdiction to Order a New Trial is Not Abrogated Where Substantial Justice So Requires.

Appellant concedes that his failure to move for a judgment of acquittal seriously militates against his arguing that this court order such judgment on grounds of insufficiency of the evidence. However, the rule above-cited does not divest this court of its inherent jurisdiction to order a new trial where such is necessary in order to obtain substantial justice. Bryan v. United States, supra, and cases cited therein. Appellant contends that such is required in the instant case.

Appellant was convicted on the uncorroborated testimony of one government witness, an undercover man with no previous experience in

narcotics offenses and with only a ten-day course from the Metropolitan Police Department. (Tr. Rec., Pp. 33-35.) The Officer admitted that he did not know the appellant and that the appellant did not know him at the time of the alleged offense. (Tr. Rec., Pp. 51, 66.) Identification was made eight days later in an alley from a photograph supplied by the Officer's superiors. (Tr. Rec., P. 168.) Only one sale was alleged and this was four months before appellant was charged and arrested. The Officer, however, remained undercover all this time, and admitted that many complaints which he filed against other defendants (51 in all) involved a number of purchases from the same sellers. (Tr. Rec., Pp. 72-73.) Further, the person (Dave), whom, the Officer stated, witnessed and participated in the sale was neither charged by the prosecution nor called as a corroborating witness. (Tr. Rec., Pp. 19-21, 223.) And, when the defense called this same witness, the prosecution declined to give him immunity, thus occasioning his invocation of the privilege against self-incrimination and unavailability at trial to the appellant. (Tr. Rec., P. 219-20.)

Appellant asserts that conviction in the type of case as that at bar, requires corroboration on the grounds employed in Farrar v. United States, 107 U.S. App. D.C. 204, 275 F.2d 868 (D.C. Cir. 1960); Wilson v. United States, 106 U.S. App. D.C. 226, 271 F. 2d 492 (D.C. Cir. 1959); Kelly v. United States, 90 U.S. App. D.C. 125, 194 F.2d 150 (D.C. Cir. 1952).

Failure of the prosecution to corroborate the testimony of the

undercover man in the light of the facts of this case clearly resulted in an insufficiency of evidence to convict appellant. If because of appellant's failure to comply with procedural requirements, this court cannot reverse and order the indictment dismissed, substantial justice would, nevertheless, seem to dictate a new trial. Such would appear to be the "appropriate judgment" under the circumstances. Bryan v. United States, supra, at 559.

CONCLUSION

The judgment of the District Court should be reversed and the cause remanded with directions to dismiss the indictment. If, however, this court finds appellant's first argument to be without merit, a new trial should be ordered by reason of appellant's arguments II and/or III.

Respectfully submitted,

Bernie R. Burrus

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(Appointed by this Court)

ACKNOWLEDGMENT OF SERVICE

Service of the foregoing brief for Appellant is acknowledged this eighteenth day of February, 1964.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,965

RAYMOND R. WOODY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
JOEL D. BLACKWELL,
GERALD A. MESSERMAN,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1) Whether, in the following circumstances, appellant is entitled to immunity from prosecution on the ground that he was denied a speedy trial:

a) there was an interval of four months between commission of the offenses charged and appellant's arrest, the entire interval was necessary to complete an undercover investigation of suspected drug peddlers, appellant was arrested on the day the investigation terminated, and appellant suffered no prejudice from the delay;

b) there was an interval of three and one half months between arraignment and trial, four continuances totalling 70 days were caused by calendar congestion, the Government requested none of the continuances, appellant objected to none of the continuances, there was no demand for an earlier trial and no motion to dismiss the indictment until the third day of trial, and appellant was not prejudiced by the short delay?

2) Whether the trial court committed an abuse of discretion in denying a motion for mistrial on the ground that a defense witness refused to testify under claim of the privilege against self-incrimination?

3) Whether testimony of a police officer that he purchased narcotics from appellant, corroborated by the introduction of the narcotics purchased, is sufficient to sustain conviction of the offenses charged?

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TABLE OF CASES

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* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,965

RAYMOND R. WOODY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a three-count indictment filed on January 14, 1963, appellant was charged with narcotics violations. 21 U.S.C. § 174; 26 U.S.C. §§ 4704(a), 4705(a). At the conclusion of a trial which commenced on May 1, 1963, a jury found appellant guilty as charged. Following conviction, the Government filed an information alleging that appellant had previously been convicted and sentenced for identical offenses. On June 14, 1963, he was sentenced to ten years imprisonment on each count in the instant case, the sentences on all counts to run concurrently.

Events Prior To Trial

On March 18, 1962, Officer Robert I. Bush of the Narcotics Squad began an undercover investigation of narcotics traffic in the District of Columbia. (Tr. 18). Bush was instructed to become familiar with drug peddlers, to purchase narcotics from them when possible, and to refrain from revealing his true identity under any circumstances. (Tr. 67, 71, 101). On August 8, 1962, during his investigation, Officer Bush purchased a six-dollar "deck" of heroin from appellant. (Tr. 21). Immediately before selling to Officer Bush, appellant sold a similar deck to James Porch in Bush's presence. (Tr. 20).

Bush was ordered to terminate his investigation on December 5, 1962. On that date, a complaint was filed for the issuance of a warrant for appellant's arrest. (Tr. 83, 101). The warrent issued and appellant was arrested immediately. An indictment was filed on January 14, 1963, appellant was arraigned on January 18th, and trial was set for February 19th. Appellant filed a motion for discovery on February 8, 1963. Among the items of information requested was the name and address of the person who had allegedly purchased narcotics from appellant in the presence of Officer Bush. Although production of that information was not ordered, defense counsel was subsequently given the name of James Porch, the person in question. (Tr. 199-200).[1] Due to calendar congestion, appellant's case was not reached on February 19th; it was continued to March 14th. On March 8, 1963, appellant filed a motion for issuance of subpoenas to Arthur Roy and James Porch. His motion was granted. Because no court was available on March 14, 1963, the case was continued. It was continued for the same reason on March 25th and April 3rd. Trial commenced on May 1, 1963.

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[1] Porch was not working for the Narcotics Squad in any capacity at the time he purchased narcotics from appellant. Porch and Bush were together when they purchased from appellant merely by accident. (Tr. 166-67).

Proceedings At Trial

Officer Bush testified that he purchased a six-dollar deck of heroin from appellant on August 8, 1962, and that he delivered the contraband to Detective David Paul on August 9th. (Tr. 21-22). Detective Paul stated that he received the deck from Bush on August 9th and gave it to Dr. William Butler on August 14th. (Tr. 94-96). Dr. Butler testified that he received the deck on August 14th, that he examined the deck and found that it contained heroin hydrochloride, and that he maintained possession of the deck until the day of trial. (Tr. 114-15).

At the conclusion of the Government's case, appellant moved to dismiss the indictment for lack of speedy trial. (Tr. 145). He alleged that he was prejudiced by the delay between offense and trial by virtue of the fact that Arthur Roy, a person to be called as a defense witness, had been arrested and committed to Saint Elizabeths Hospital for a mental examination during that delay. (Tr. 147). Roy had been indicted on January 14, 1963 and arrested prior to March 1, 1963. (Tr. 149-50). After ruling that the fact of commitment did not render the witness incompetent and that the prosecutor would not be allowed to inquire regarding the commitment, the court denied the motion to dismiss the indictment. (Tr. 152-57).

After all further motions were denied, the defense commenced the presentation of its case by calling James Porch. Apprised of the fact that Porch was in jail in connection with a narcotics charge,[2] the court informed Porch of his privilege against self-incrimination and appointed an attorney to advise Porch "with respect to his rights." (Tr. 184). After Porch consulted with counsel, the court was advised that Porch would refuse to answer questions regarding his presence at the scene of the August 8th transaction. (Tr. 201). Defense counsel stated

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[2] A warrant for Porch's arrest had been issued on March 15, 1963.

that he would prefer to have the witness assert the privilege, if he was going to do so, in the presence of the jury. (Tr. 193). He also moved for a mistrial on the ground that the witness' refusal to testify "just destroys the whole defense case." (Tr. 196). The motion was denied. (Tr. 215). The witness was then called and, in the presence of the jury, he refused to answer questions propounded to him by defense counsel. (Tr. 219-20).

CONSTITUTIONAL PROVISION, STATUTES AND RULE INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . .

Title 21, U.S.C. § 174, provides:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Title 26, U.S.C. § 4704(a) provides:

> It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original

stamped package; and the absence of appropriate tax paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Title 26 U.S.C. § 4705(a) provides:

> It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

Rule 48(b) of the Federal Rules of Criminal Procedure provides:

> If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

SUMMARY OF ARGUMENT

I

The trial court did not commit an abuse of discretion in allowing appellant to be prosecuted for offenses he committed four months prior to his arrest. The interval between offense and arrest was justified by the necessity of withholding the identity of the agent to whom appellant had sold heroin until he had completed his undercover investigation. Appellant did not object to that delay by moving to dismiss the indictment before trial. He did not request a hearing to establish that he had been prejudiced by the delay. In fact, he was not prejudiced. In these circumstances reversal of the trial court's refusal to dismiss the indictment would be wholly unwarranted.

Appellant was not denied a speedy trial by virtue of a 3½ month delay between arraignment and trial. The in-

terval between indictment and trial was attributable entirely to the requirements of the ordinary processes of justice. None of the delay was caused by the Government. None of the continuances was objected to by appellant. Appellant was not prejudiced by the short and necessary delay. These circumstances do not entitle him to immunity from prosecution.

II

The trial court did not commit an abuse of discretion in denying a motion for mistrial when an individual called as a defense witness asserted his privilege against self-incrimination. Assertion of the privilege was properly upheld. There was no indication that the witness would be more willing to testify at a later date. Thus, there was no basis for the court to terminate the trial before it reached the jury.

III

Appellant's conviction is supported by substantial evidence. A police officer testified that appellant sold him narcotics. The officer's testimony was corroborated by introduction of the narcotics sold. No more is required to prove the offenses charged.

ARGUMENT

I. Appellant was not denied a speedy trial.

(See Tr. 18-21, 83, 101, 145-57, 184-221).

A. *The Four-Month Interval Between The Date Appellant Committed The Offenses Charge And The Date Of His Arrest Does Not Entitle Him To Immunity From Prosecution.*

Appellant unlawfully sold heroin to an officer of the Metropolitan Police Department on August 8, 1962 (Tr.

21). In order to complete an undercover investigation, the officer refrained from filing a complaint regarding the transaction until December 5, 1962 (Tr. 83, 101). On December 5th, a warrant was issued and appellant was arrested. That the four-month interval between offense and arrest provides no basis for appellant's assertion that he was denied a speedy trial has been expressly recognized by this Court. *Nickens* v. *United States*, —— U.S. App. D.C. ——, 323 F.2d 808 (1963). Nor, as the following decisions demonstrate, has this Court found any other constitutional infirmities in cases where the interval between offense and arrest was challenged.

Case	Time Between Offense and Arrest	Decision
Nickens v. *United States* [3]	7 1/2 months	Affirmed
Tee Ann Wilson v. *United States* [4]	6 months	Affirmed
Vincent Wilson v. *United States* [5]	7 months (1st offense) 3 months (last offense)	Leave to appeal *in forma pauperis* denied
Redfield v. *United States* [6]	5 2/3 months (1st offense) 3 months (last offense)	Affirmed
Ross v. *United States* [7]	7 months	Remanded for hearing on reasonableness of delay

Since the interval between offense and arrest is substantially shorter in the instant case than it was in either *Nickens* or *Tee Ann Wilson*, the decisions in those cases

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[3] —— U.S. App. D.C. ——, 323 F.2d 808 (1963).

[4] D.C. Cir. No. 17,895, decided October 3, 1963, *rehearing en banc denied*, February 13, 1964.

[5] Misc. No. 2173, *leave to appeal denied*, January 10, 1964.

[6] D. C. Cir. No. 17,818, decided January 30, 1964.

[7] D. C. Cir. No. 17,877, *remanded for further proceedings*, January 28, 1964.

compel affirmance of the trial court's denial of appellant's motion to dismiss. The type of remand which this Court ordered in *Ross* would not be appropriate in the circumstances of the instant case. In *Ross*, there was a pre-trial motion to dismiss the indictment, there was a seven-month interval between offense and arrest, and there was testimony from the defendant that he did not commit the offenses charged and that he could not recall his activities on the date of the offense. In the instant case, there was no pre-trial motion for dismissal, the interval between offense and arrest was only four months, and the appellant did not deny the offense or testify that his recollection of the events on the date of the offense was dulled by the passage of time.

The short delay between offense and arrest in the instant case was fully justified by the necessity of withholding the identity of Officer Bush in order that he might conduct an effective undercover investigation. The trial court recognized, and defense counsel agreed, that such an investigation would be impossible if the investigating agent were compelled to initiate prosecution immediately after making a purchase. (Tr. 156). Unless law-enforcement agencies are to be barred from engaging in undercover investigations for the purpose of detecting and deterring the sale of narcotic drugs, appellant's insistence upon the right to immediate arrest must be rejected.

B. *In the circumstances of this case, the five-month interval between arrest and trial does not constitute a violation of the right to speedy trial.*

Appellant was arrested on December 5, 1962, indicted on January 4, 1963, and arraigned on January 18, 1963. Trial commenced on May 1, 1963 after four continuances. Each continuance was due to the unavailability of a court. Appellant objected to none of the continuances, nor did he allege that he had been denied a speedy trial until May 6, 1963—the third day of his trial. (Tr. 145). His

motion to dismiss the indictment at that time was denied. (Tr. 157). The propriety of the trial court's ruling is demonstrated by consideration of any and all factors which are relevant to the issue.

Apart from any other consideration, the brevity of the interval between arrest and trial defeats appellant's contention. The entire period is less than five months. Ten months was involved in *Willis* v. *United States*, 106 U.S. App. D.C. 211, 271 F.2d 477 (1959), and seven months in *Porter* v. *United States*, 106 U.S. App. D.C. 150, 270 F.2d 453 (1959) and *King* v. *United States*, 105 U.S. App. D.C. 193, 265 F.2d 567 (1959). See also *Walker* v. *United States*, D.C. Cir. No. 17,897, decided November 14, 1963, *rehearing, en banc denied*, January 28, 1964 (6½ months); *Smith* v. *United States*, D.C. Cir. No. 17,106, decided *en banc* February 20, 1964 (6 months); *Nickens* v. *United States*, *supra* (9 months). This Court did not find the delays unreasonable in *Willis*, *Porter* or *King*. *A fortiori*, the period of delay here is not unreasonable.

Another factor relevant to the issue of speedy trial is the cause of the delay. In the instant case, the delays were not "purposeful or oppresive,"[10] nor were they ". . . vexatious, capricious and oppressive delays manufactured by the ministers of justice." BLACK, CONSTITUTIONAL LAW § 266. Trial was originally scheduled for February 19, 1963. The entire seventy-day period between that date and the actual commencement of trial was caused by calendar congestion. No delay was caused by the prosecution. Thus, the period of delay for which the defense was not responsible is identical to that involved in *Porter* and *King*, and 84 days less than was

[10] *Pollard* v. *United States*, 352 U.S. 354, 361 (1957). As this Court stated in *Smith* v. *United States*, D.C. Cir. No. 17,106, decided *en banc* February 20, 1964, ". . . [T]he authorities demonstrate that the balance between the rights of public justice and those of the accused has been upset against the Government only where the delay has been arbitrary, purposeful, oppressive or vexatious." (slip opinion, pp. 6-7).

involved in *Willis*. Upon these facts, "there is no constitutional or other compulsion upon [this Court] to reverse the District Judge's ruling on this issue." *Walker* v. *United States*, D.C. Cir. No. 17,897, decided November 14, 1963 (slip opinion, p. 3), *rehearing en banc denied*, January 28, 1964.

A third factor which must be considered in evaluating appellant's charge that he was denied a speedy trial is his failure to object to any of the continuances responsible for the seventy-day interval between the originally scheduled trial date and the actual date of trial. Appraising the effect of such inaction, this Court recently stated that "an accused may waive his right, and he will be deemed to have done so unless the right be promptly asserted." *Smith* v. *United States*, *supra* (slip opinion, p. 7) (footnotes omitted). Having registered no objection to any of the continuances and having failed to make any request for an earlier trial, appellant is now precluded from demanding release on the theory that he was denied a speedy trial. See, *e.g.*, *James* v. *United States*, 104 U.S. App. D.C. 263, 261 F.2d 381 (1958).

A final circumstance to consider is whether the accused was prejudiced by the delay between arrest and trial. The only prejudice alleged is the "unavailability at trial of a material defense witness." (Br. 10). The witness referred to is James Porch or "Dave"—the man who was present when appellant sold narcotics to Officer Bush. (Tr. 20). Porch's "unavailability" arises from the fact that he asserted his privilege against self-incrimination in refusing to testify at appellant's trial. (Tr. 219-20). Appellant now maintains that his entire defense was predicated upon the testimony expected from Porch. (Br. 13). If that be the case, the earliest date upon which appellant was ready for trial was March 14, 1963—the second scheduled trial date. Appellant did not learn of the identity of Porch until sometime after February 15, 1963. (Tr. 199-200). He did not move to have him subpoenaed as a witness until March 8, 1963. Thus, his trial

commenced a month and a half after the first date upon which Porch was available to testify. Since a warrant for Porch's arrest had been issued on March 15, 1963, his situation would have been the same on that date as it was on the actual date of trial. There is no basis for concluding that Porch's reluctance to testify resulted in any way from the short delay caused by calendar congestion. To the contrary, if appellant had gone to trial on August 8, 1962, the date he committed the offenses charged, the possibility that Porch would refuse to testify would have been as great as it was on May 1, 1963. According to the testimony of Officer Bush, Porch purchased narcotics from appellant on August 8th. (Tr. 20). The possibility that Porch might incriminate himself by testifying about that transaction is obvious. It is a possibility which would have existed whether or not criminal charges had been pending against Porch at the time of trial. Since Porch's "unavailability" did not result from the delay between arrest and trial, his refusal to testify provides no basis for appellant's allegation of prejudice.

Appellant was subjected to no more delay than was reasonably attributable to the ordinary processes of justice. The interval between offense and trial was as brief as circumstances would allow—far too brief to suggest the possibility of a constitutional deprivation which would immunize appellant from prosecution. Appellant did not object to the necessary continuances of his case, nor did he demand a more immediate trial than was granted him. His cause was not prejudiced by the interval of less than 3½ months between arraignment and trial. In these circumstances, he is not entitled to release on the ground of denial of speedy trial.

II. The trial court did not commit an abuse of discretion in denying a motion for mistrial when a defense witness announced that he would refuse to testify under claim of the privilege against self-incrimination.

(See Tr. 20, 166-67, 184-221).

The sale of narcotics which gave rise to appellant's prosecution was conducted in the presence of James Porch. (Tr. 20). Porch was not employed in any capacity by the Narcotics Squad. (Tr. 166-67). He merely happened to be purchasing narcotics from appellant at approximately the same time appellant sold to Officer Bush. At trial, the defense called Porch as a witness. After Porch had consulted with counsel, it was announced that he would refuse to testify regarding his presence at the scene of the transaction on the ground that such testimony might tend to incriminate him. (Tr. 201). Appellant now challenges the trial court's denial of a motion for mistrial based upon Porch's refusal to testify. He does not contend, however, that the court erred in refusing to compel Porch to testify.

In a recent case involving the propriety of granting a mistrial on the basis of the unavailability of a witness, the Supreme Court stated, "The discretion to discharge the jury before it has reached a verdict is to be exercised only in very extraordinary and striking circumstances. . . ." *Downum* v. *United States*, 372 U.S. 734, 736 (1963). This Court has also held that a motion for mistrial is directed to the sound discretion of the trial court. *McIntosh* v. *United States*, 114 U.S. App. D.C. 1, 309 F.2d 222 (1962), *cert. denied*, 373 U.S. 944 (1963). No abuse of the discretion occurred in the instant case.

In any trial, both parties are apt to encounter disappointments, surprises and reversals. If such normal trial occurrences were to provide an absolute right to mistrial, few trials would reach completion. The particular situation which arose in the instant case is somewhat similar to that which occurred in *Payton* v. *United States*,

96 U.S. App. D.C. 1, 222 F.2d 794 (1955). In *Payton* a person to be called as a defense witness was unable to appear because suffering narcotics withdrawal. Despite the fact that the accused requested a continuance rather than a mistrial, this Court held that the trial court did not commit an abuse of discretion in denying the defense motion. See also *Sanchez* v. *United States*, 311 F.2d 327 (9th Cir. 1962), *Smith* v. *United States*, 273 F.2d 462 (10th Cir. 1959). Here, appellant demanded a mistrial. (Tr. 196). There was no suggestion that Porch might agree to testify at some later date. Nor was there any suggestion that the defense would be in a better position to proceed at some time in the future. In addition, by announcing ready for trial on February 19, 1963—before Porch had been supoenaed to testify—defense counsel had indicated that appellant was ready to go to trial without Porch's testimony. In these circumstances, the trial court properly exercised its discretion in denying the motion for mistrial.

III. A police officer's testimony that appellant sold him narcotics is sufficient to sustain conviction of the crimes charged.

(See Tr. 18-22, 94-96, 114-15).

Appellant contends that his conviction cannot be sustained on the basis of the uncorroborated testimony of a police officer. This Court has expressly rejected that contention:

> We have heretofore held on several occasions that the uncorroborated testimony of a narcotics agent is sufficient to support conviction for violation of the narcotics laws See, e.g., *Morgan* v. *United States*, ——U.S. App. D.C. ——, 319 F.2d 711 (1963). It is also well settled that the verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the Government.[11]

[11] *Wilson* v. *United States*, D.C. Cir. No. 17,895, decided October 3, 1963, *rehearing en banc denied*, February 13, 1964.

The jury was entitled to believe the testimony of Officer Bush. It did. Appellant has no basis for complaint, particularly since he failed to move for judgment of acquittal. Accordingly, the judgment of conviction must be sustained.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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